

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been previously before the Board. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³ The relevant facts are as follows.

On October 9, 2015 appellant, then a 61-year-old retired customer services supervisor, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral knee pain, right more than left, due to factors of her federal employment, including repetitive walking, standing, stooping and bending. She noted that she first became aware of her condition on June 23, 2009 and realized its relation to factors of her federal employment on February 24, 2015. Appellant did not stop work.

In an attached statement, appellant noted that she worked with the employing establishment for over 37 years and retired on October 1, 2015. Prior to her retirement, she explained that her role as a supervisor required her to do constant walking to the window unit, parcel area, box section, and sometimes walking into automated areas. Appellant performed these duties eight hours per day, five days per week. She indicated that she has experienced knee pain due to her duties and that she had never had any problems with her knees in the past and that she had no hobbies that would have caused or aggravated her condition.

In a development letter dated November 2, 2015, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion to provide further details regarding the circumstances of her claimed injury. OWCP also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding appellant's occupational disease claim. OWCP afforded both parties 30 days to respond. Appellant did not submit any additional evidence.

By decision dated December 3, 2015, OWCP denied appellant's occupational disease claim, finding that she had not submitted medical evidence containing a diagnosis in connection with her injury. Consequently, it concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In a September 15, 2015 letter, Dr. Steven Inbody, a Board-certified neurologist, noted that on or about June 23, 2009 appellant became aware of an aggravation of a preexisting injury of the right knee and a new injury to the left knee while

³ Docket No. 16-1284 (issued February 14, 2017).

performing her repetitive duties of walking, standing, stooping, and bending. He noted her history of injury, including a 2006 right knee meniscus tear and collateral ligament tear. Appellant underwent arthroscopic surgery and eventually a total right knee replacement to treat her injury. Dr. Inbody opined that the repetitive traumas she experienced in her job as a postal employee, which required her to walk throughout the day with prolonged standing and very little time to set and effectively complete her job requirements, were the cause of her condition. He diagnosed bilateral internal derangement of the knees.

In a November 19, 2015 response to OWCP's development questionnaire, appellant explained that, due to her role as a supervisor, she was required to perform constant walking, bending, and stooping in order to check areas of responsibility for eight hours per days, five days per week. She asserted that she had no hobbies that would have caused or agitated her conditions.

In an undated statement, the employing establishment controverted appellant's claim, asserting that she did not perform any physical exertion of lifting, pushing, pulling, bending, or stooping as she had lower-level craft employees to perform those tasks. It alleged that she was only required to lift bare essentials while performing her administrative duties and that she was required to perform more administrative work than physical work in her role. The employing establishment suggested that the physical work appellant performed was related to her care for her elderly mother. It also submitted a position description of her duties as a customer service supervisor.

On December 11, 2015 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In an April 22, 2016 letter, T.T., an area manager, noted that appellant did not walk, stand, bend, or stoop for eight hours a day as her job only required her to monitor the workroom floor. She described appellant's duties, including the use of a yard stick to measure the mail and asserted that appellant had been observed calling carriers from her desk to give instructions instead of walking to the carrier case. T.T. estimated that appellant performed a minimum of two hours of intermittent standing and walking.

By decision dated May 16, 2016, an OWCP hearing representative affirmed OWCP's December 3, 2015 decision, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's knee conditions and the accepted factors of her federal employment.

On June 3, 2016 appellant appealed OWCP's May 16, 2016 decision to the Board.

By decision dated February 14, 2017,⁴ the Board affirmed OWCP's May 16, 2016 decision.

OWCP continued to receive evidence following the Board's February 14, 2017 decision. In a January 9, 2015 medical report, Dr. Stephen Simonich, Board-certified in neuromusculoskeletal medicine, evaluated appellant for her right knee pain. He observed her

⁴ *Id.*

history of treatment, including a right knee arthroscopy and physical therapy and noted that she still experienced pain that interfered with her activities of daily living. On examination and review of appellant's diagnostic imaging, Dr. Simonich diagnosed right knee degenerative joint disease and recommended she undergo a total knee replacement to treat her condition. In an April 6, 2015 operative report, he indicated that she underwent a right knee total arthroplasty.

In a December 10, 2015 diagnostic report, Dr. Chad Porter, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's left knee finding a medial meniscus horizontal tear involving the posterior root, posterior horn and body with extension to the adjacent tibial articular surface and trace suprapatellar joint effusion.

In a February 14, 2019 narrative medical report, Dr. Inbody agreed that his previous medical report lacked critical information as to causation and requested that OWCP reconsider appellant's claim.⁵ He noted diagnoses of posttraumatic osteoarthritis of both knees and opined that her conditions were causally related to the factors of her federal employment. Dr. Inbody explained that the continuous repetitive stress on appellant's knees from her employment duties caused her injuries and contrasted these effects with common osteoarthritis of the knee that develops slowly with normal aging or an acute rotational injury to the knee. He reasoned that the compensatory injury to her left knee was the result of the necessary limitation of weight bearing with the right lower extremity. Dr. Inbody also reviewed appellant's history of treatment, including arthroscopic surgeries, therapy and injections to treat her conditions. He concluded by stating that appellant continuing to work after her 2009 right knee arthroscopic repair accelerated the tempo of aggravating effects on her injury. Dr. Inbody opined that the sequential physical findings, symptoms, and necessary procedures to treat her knees were consistent with the effects of prolonged aggravating daily repetitive stress from her self-reported performance of multiple additional duties usually assigned to others in a busy yet understaffed employing establishment.

On May 30, 2019 appellant requested reconsideration of OWCP's February 14, 2017 decision. In an attached statement, she recounted her federal employment duties as a customer services supervisor since 2005 and described the development of her knee injuries and subsequent treatments. Appellant explained that she was required to perform more standing, walking, stooping, and bending due to a staffing problem at the employing establishment. She also listed the dates of surgeries she underwent to treat her conditions.

By decision dated August 28, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For

⁵ In a May 22, 2019 letter, OWCP notified appellant that Dr. Inbody could not request reconsideration for her because he was a medical provider and not an authorized representative.

⁶ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁸ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁹ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹⁰

OWCP may not deny a request for reconsideration solely because the request was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.¹¹ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹²

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³ The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁵ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁸ The Board makes an independent

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

⁹ *Id.* at Chapter 2.1602.4(b) (February 2016).

¹⁰ *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

¹¹ *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

¹² *Id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹³ *G.G.*, *supra* note 11.

¹⁴ *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* 10.

¹⁵ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹⁶ *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

¹⁷ *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

¹⁸ *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

As noted above, OWCP's regulations²⁰ and procedures²¹ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues,²² including any merit decision by the Board.²³ The most recent merit decision was the Board's February 14, 2017 decision, which affirmed OWCP's May 16, 2016 decision. Appellant had one year from the Board's February 14, 2017 decision to timely request reconsideration. As OWCP did not receive her reconsideration request until May 30, 2019, more than one year after the February 14, 2017 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of her claim.²⁴

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision, dated May 16, 2016. OWCP denied her occupational disease claim because she did not establish a bilateral knee condition causally related to the accepted factors of her federal employment. The evidence submitted failed to raise a substantial question concerning the correctness of OWCP's May 16, 2016 decision.²⁵

Appellant submitted a February 14, 2019 narrative medical report in which Dr. Inbody diagnosed bilateral post-traumatic osteoarthritis of the knees and opined that her conditions were causally related to the factors of her federal employment. Dr. Inbody explained that the continuous repetitive stress on her knees from her employment duties caused her injuries and contrasted these effects with common osteoarthritis of the knee that develops slowly with normal aging or an acute rotational injury to the knee. He reviewed appellant's history of treatment, including arthroscopic surgeries, therapy and injections and also reasoned that the compensatory injury to her left knee

¹⁹ W.R., Docket No. 19-0438 (issued July 5, 2019); C.Y., Docket No. 18-0693 (issued December 7, 2018).

²⁰ *Supra* note 7; see *Alberta Dukes*, 56 ECAB 247 (2005).

²¹ *Supra* note 8; see *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²² J.W., *supra* note 16; *Robert F. Stone*, 57 ECAB 292 (2005).

²³ M.H., Docket No. 20-1386 (issued February 17, 2021); *supra* note 8.

²⁴ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005). The Board notes that in its August 28, 2019 decision OWCP actually indicated that appellant did not demonstrate clear evidence of error of the Board's February 14, 2017 decision. However, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. See 20 C.F.R. § 501.6(d). The proper subject of review was OWCP's May 16, 2016 merit decision.

²⁵ See *P.T.*, Docket No. 18-0494 (issued July 9, 2018).

was the result of the necessary limitation of weight bearing with the right lower extremity. Dr. Inbody concluded by stating that appellant's continuing to work after her 2009 right knee arthroscopic repair accelerated the tempo of aggravating effects on her injury.

Appellant also submitted medical reports dated January 9 and April 6, 2015, in which Dr. Simonich diagnosed degenerative joint disease in her right knee and detailed a right knee total arthroscopy procedure performed to treat her condition. OWCP also received a December 10, 2015 diagnostic report in which Dr. Porter diagnosed a medial meniscus horizontal tear involving the posterior root, posterior horn and body with extension to the adjacent tibial articular surface and trace suprapatellar joint effusion. The Board notes, however, that appellant failed to explain how the medical evidence submitted raised a substantial question regarding the correctness of OWCP's May 16, 2016 decision.

As previously noted, clear evidence of error is intended to represent a difficult standard.²⁶ Even the submission of a detailed, well-rationalized report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, does not constitute clear evidence of error.²⁷ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²⁸ Instead, the evidence must shift the weight in appellant's favor.²⁹ While Drs. Inbody, Simonich, and Porter diagnosed multiple bilateral knee conditions due to the accepted factors of appellant's federal employment, the Board finds that their reports are insufficient to demonstrate clear evidence of error.

The Board thus finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in the issuance of its May 16, 2016 decision. Accordingly, OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant asserts that she did not receive notice of the Board's February 14, 2017 decision until February 23, 2018. The Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule. Appellant did not submit evidence of nondelivery of the Board's February 14, 2017 decision such that the presumption of receipt would be rebutted. Accordingly, without evidence to the contrary, the February 14, 2017 decision is presumed to have arrived at appellant's mailing address.

²⁶ *Supra* note 13.

²⁷ *E.K.*, Docket No. 18-0422 (issued August 22, 2018).

²⁸ *Id.*

²⁹ *R.S.*, Docket No. 18-0505 (issued July 24, 2018).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board